

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**IN RE: GENERIC PHARMACEUTICALS  
PRICING ANTITRUST LITIGATION**

**MDL 2724  
16-MD-2724  
HON. CYNTHIA M. RUFÉ**

**THIS DOCUMENT RELATES TO:  
*ALL ACTIONS***

**PURCHASING DEFENDANTS' OBJECTIONS TO SPECIAL MASTER  
DAVID H. MARION'S ELEVENTH REPORT AND RECOMMENDATION**

AmerisourceBergen Drug Corp., H.D. Smith, LLC, Cardinal Health, Inc., The Harvard Drug Group, LLC, McKesson Corp., Morris & Dickson, Co., LLC, Red Oak Sourcing, LLC, and Walgreens Boots Alliance, Inc. (collectively, the “Purchasing Defendants”), in accordance with Pretrial Order No. 163 (ECF Doc. No. 1707) and Fed. R. Civ. P. 53(f), submit these objections to Special Master David H. Marion’s Eleventh Report and Recommendation (the “11<sup>th</sup> R&R”) (ECF Doc. No. 1983).

The 11<sup>th</sup> R&R, issued on March 6, 2022, recommends a schedule to govern the non-bellwether cases in this MDL, including, in relevant part, a recommendation “that all Defendants be required to file Answers to the Complaints, including affirmative defenses, within thirty (30) days of the date of acceptance of this Recommendation, or the Court’s ruling thereon,” *id.* ¶ II.2, and a recommendation that “discovery in all cases should proceed now on parallel tracks,” *id.* ¶ II.3. The 11<sup>th</sup> R&R would create a significant burden if applied to the Purchasing Defendants, who have pending motions to dismiss the only complaint against them and therefore who have never answered any complaints in these cases, and who have a negotiated, court-approved stay of party discovery until that motion is resolved. Accordingly, after publication of the 11<sup>th</sup> R&R, counsel for McKesson Corp. wrote to Special Master Marion seeking clarification that Paragraphs II.2 and II.3 of the 11<sup>th</sup> R&R were not meant to apply to the Purchasing Defendants.<sup>1</sup> In response, Special Master Marion confirmed that the 11<sup>th</sup> R&R “was entered without any consideration” of the Purchasing Defendants’ “special circumstances,” which “were not presented or considered in the briefing or conference calls preceding the 11<sup>th</sup> R&R.”<sup>2</sup> That is correct, as counsel to the Purchasing Defendants were not even aware of any of the proposals submitted to Special Master

---

<sup>1</sup> See March 9 Letter from A. Ellis to D. Marion, attached hereto as Exhibit A.

<sup>2</sup> March 9 E-mail from D. Marion to A. Ellis, attached hereto as Exhibit B.

Marion in connection with the 11<sup>th</sup> R&R and thus did not participate at all. The Special Master declined to provide the requested clarification, however, and suggested that McKesson “use the objection process” to raise its concerns with the Court.<sup>3</sup>

**I. The Purchasing Defendants Should Not Be Required to Answer the IRPs’ Complaint While Their Motion to Dismiss Is Pending**

The Purchasing Defendants are uniquely situated in this litigation because they are named as defendants in only a single complaint<sup>4</sup>—the complaint filed by the Indirect Reseller Plaintiffs (“IRPs”) in December 2019 (No. 19-cv-6044, ECF Doc. No. 1)<sup>5</sup>—and because many of them are absent class members of the many complaints filed by the Direct Purchaser Plaintiffs. The Purchasing Defendants moved to dismiss the IRPs’ complaint in July 2020 and therefore have never answered any complaint. Filing and serving an answer under those circumstances would impose a significant burden on the Purchasing Defendants and run contrary to both the letter and spirit of the Federal Rules of Civil Procedure.<sup>6</sup> Additionally, the IRPs have confirmed to the Purchasing Defendants that they are not seeking answers from the Purchasing Defendants at this time. With the only affected parties in agreement on this point, the Purchasing Defendants respectfully request that the Court modify Paragraph II.2 of the 11<sup>th</sup> R&R to exclude the Purchasing Defendants from the requirement that they answer the IRPs’ complaint.

---

<sup>3</sup> *Id.*

<sup>4</sup> McKesson was previously named as a defendant in a suit brought by Marion Diagnostic Center, LLC and Marion Healthcare, LLC, but obtained a complete dismissal of that complaint in an order from the Court dated June 26, 2019. (No. 18-cv-4137, ECF Doc. No. 112).

<sup>5</sup> The IRPs subsequently amended their complaint in May 2020. (No. 19-cv-6044, ECF Doc. No. 61).

<sup>6</sup> *See* Fed. R. Civ. P. 12(a)(4)(A) (“[I]f the court denies the motion . . . the responsive pleading must be served within 14 days after notice of the court’s action.”).

**II. The Purchasing Defendants' Stay of Party Discovery Should Remain in Effect**

The Purchasing Defendants are also subject to a carefully negotiated and Court-ordered stay of party discovery. Specifically, in April 2020, the Court approved a stipulation between the IRPs and the Purchasing Defendants ordering that “all party discovery [as to the Purchasing Defendants] is stayed” and that the Purchasing Defendants “shall not be required to produce any documents in response to IRP RFPs during the pendency of the [Purchasing Defendants’] Motions to Dismiss.” (No. 19-cv-6044, ECF Doc. No. 40) (“Stay Order”). Absent modification, Special Master Marion’s recommendation that “discovery in all cases should proceed now on parallel tracks” would directly contradict that Stay Order. There is no justification for doing so. While the Court has allowed party discovery to proceed against manufacturers who still have Rule 12 motions pending, it has already determined that there are sufficient allegations in the plaintiffs’ complaints to state a claim for conspiracy among the generic manufacturers. No conspiracy claims have been sustained against any of the Purchasing Defendants and none of the conspiracy claims that have withstood a Rule 12 motion have involved the alleged participation of any of the Purchasing Defendants. Further, the IRPs have confirmed that they have not sought, and still do not seek, to alter the status quo as set out in the Stay Order. With the parties in agreement on this point as well, the Purchasing Defendants respectfully request that the Court modify Paragraph II.3 of the 11<sup>th</sup> R&R to exclude the Purchasing Defendants pending resolution of the Purchasing Defendants’ motions to dismiss.

Dated: March 27, 2022

Respectfully submitted,

/s/ Abram J. Ellis*On behalf of Purchasing Defendants*

<p><i>Counsel for McKesson Corporation</i></p> <p><u>/s/ Abram J. Ellis</u> (D.C. Bar # 497634)</p> <p>Abram J. Ellis Sara Y. Razi Joshua G. Hazan <b>SIMPSON THACHER &amp; BARTLETT LLP</b> 900 G Street NW Washington, DC 20001 202-636-5579 aellis@stblaw.com sara.razi@stblaw.com joshua.hazan@stblaw.com</p>	<p><i>Counsel for AmerisourceBergen Drug Corp. and H.D. Smith, LLC</i></p> <p><u>/s/ Michelle A. Mantine (w/consent)</u> (PA Bar # 203102)</p> <p>Michelle A. Mantine Christopher R. Brennan Courtney B. Averbach Danielle L. Stewart <b>REED SMITH LLP</b> 225 Fifth Avenue Pittsburgh, PA 15222 412-288-4268/4583 mmantine@reedsmith.com cbrennan@reedsmith.com caverbach@reedsmith.com dstewart@reedsmith.com</p>
<p><i>Counsel for Cardinal Health, Inc. and The Harvard Drug Group, LLC</i></p> <p><u>/s/ Jason C. Murray (w/consent)</u> (CA Bar # 169806)</p> <p>Jason C. Murray Katie Yablonka Jordan Ludwig <b>CROWELL &amp; MORING LLP</b> 515 South Flower Street, 40th Floor Los Angeles, CA 90071 213-443-5590 jmurray@crowell.com kyablonka@crowell.com jludwig@crowell.com</p>	<p><i>Counsel for Walgreens Boots Alliance, Inc.</i></p> <p><u>/s/ Brian Byrne (w/consent)</u> (D.C. Bar # 449881)</p> <p>Brian Byrne Steven J. Kaiser Carl Lawrence Malm <b>CLEARY GOTTlieb STEEN &amp; HAMILTON LLP</b> 2112 Pennsylvania Avenue NW, Suite 1000 Washington, DC 20037 202-974-1500 bbyrne@cgsh.com skaiser@cgsh.com lmalm@cgsh.com</p>

<i>Counsel for Red Oak Sourcing, LLC</i> <u>/s/ John F. Zabriskie (w/consent)</u> <i>(IL Bar # 6187887)</i> John F. Zabriskie Benjamin R. Dryden <b>FOLEY &amp; LARDNER LLP</b> 321 N. Clark Street, Suite 3000 Chicago, IL 60654 312-832-5199 jzabriskie@foley.com bdryden@foley.com	<i>Counsel for Morris &amp; Dickson Co., LLC</i> <u>/s/ Barry Barnett (w/consent)</u> <i>(TX Bar # 01778700)</i> Barry Barnett Thomas W. Paterson Drew Hansen <b>SUSMAN GODFREY LLP</b> 8115 Preston Road, Suite 575 Dallas, Texas 75225 866-754-1900 bbarnett@susmangodfrey.com tpaterson@susmangodfrey.com dhansen@susmangodfrey.com
---	--